IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.168/2005
ALONG WITH
SECOND APPEAL NO. 139/2005.

Mr. Placido Francisco Pinto. ..... Appellant.

V/s.

Mr. Jose Francisco Pinto and another. ..... Respondents.

Mr. J.E. Coelho Pereira, Senior Advocate with Mr. V. Braganza, Advocate for the appellant.

Mr. M. S. Usgaonkar, Senior Advocate with Ms. P. Kamat, Advocate for the respondents.

CORAM : P.V. KAKADE, J.

DATE : 16TH AUGUST, 2006.

ORAL ORDER :

Both these appeals are being disposed of by this common order as they arise out of same dispute between the same parties, who had filed two suits and the trial Court had adjudicated the suits separately, but the lower appellate Court, in order to avoid multiplicity of findings and for the sake of convenience, disposed of both the appeals by common order in Regular Civil Appeal No. 20/97 and Regular Civil Appeal No.22/01 by Judgment dated 6.7.2005. Though the Judgment of the lower appellate Court is common,

the appellant thought it fit to file two separate appeals which are being disposed of by this common order.

2. I have heard the learned Senior Counsel for both the parties. Perused the record. One of these appeals is directed against the judgment and order of the appellate Court in Regular Civil Appeal No. 20/97 wherein the Judgment and Order of the trial Court in Special Civil Suit No.55/77 was in issue. The other appeal pertains to Judgment and Order in Regular Civil Appeal No.22/01 which had arisen against the judgment and order passed by the trial Court in Special Civil Suit No.71/1980. The lower appellate Court, on the basis of the record, reversed the trial Court's order and Special Civil Suit No.71/1980 came to be decreed holding that the sale deed dated 14.9.1970 was null and void as fraud was committed while getting it executed. Consequently, the Sub-Registrar of Margao was directed to cancel the registration of the sale deed from his record. Judgment in Special Civil Suit No..55/1977 was also quashed and set aside and the suit filed by the present respondents came to be dismissed.

3. For the sake of convenience, let us refer to the factual scenario involved in both the suits separately :

In Special Civil Suit No.55/1977, the plaintiff came with a case

that respondent Placido Francisco Pinto was the brother of defendant No.1 Jose Francisco Pinto. By Sale Deed dated 14.9.70, defendants No.1 and 2 sold to the plaintiff the southern half of the property called “Pedda”, situated at Navelim with half of the house existing in the said property. The southern half is the subject-matter of the suit. On account of the sale transaction, the plaintiff allegedly became the absolute owner of the suit property, but he allowed defendants No.1 and 2 to continue living in the house for 5 years and writing was also executed to that effect. It is sought to be made out by the plaintiff that they freed all the encumbrances on the property. According to plaintiff, defendants No.1 and 2 besides occupying the house existing in the suit property, proceeded to appropriate the rents paid by the remaining defendants. After expiry of the five years, the plaintiff sought possession of the property, but the defendants declined to do so. Hence, Special Civil Suit No.55/77 came to be filed. The defendants contested the suit on various grounds, inter alia, submitting that they did not sell the property as alleged in the year 1970 and their signatures were obtained fraudulently and by misrepresentation of fact that the said document was pertaining to the loan amount paid by the plaintiff and, as such, it was submitted that the sale deed itself was null and void for want of consideration.

4. Special Civil Suit No.71/1980 came to be filed against the defendants for declaration that the sale deed dated 14.9.70 was null and void and for directing the Sub-Registrar, Margao to cancel the registration of the sale deed. The suit essentially was filed to claim the same relief which was put up as defence in the earlier suit. The defendants in that suit raised various contentions including that the subsequent suit was barred by principle of *res judicata* as contemplated under Section 11 of the Code of Civil Procedure.

The learned trial Judge decreed the Special Civil Suit No. 55/77/B to the extent that defendants No.1 and 2 are directed to hand over vacant possession of the house occupied by them and existing in the suit property within certain period. In Special Civil Suit No. 71/1980, the trial Court dismissed the suit for the reasons noted therein, holding that the plaintiff failed to prove that the sale deed was obtained by the defendants by fraud and misrepresentation. Hence, the appeals were carried to the District Court, which recorded the findings as noted above and hence, the present appeals.

5. At the outset, it may be noted that the basic issue around which the entire dispute revolves is pertaining to the allegations regarding fraud and misrepresentation while obtaining the sale deed dated 14.9.1970. On

critical perusal of the judgment of the lower appellate Court, it is seen that entire evidence on record has been appreciated by the lower appellate Court in its proper perspective. The learned Counsel for the appellant vehemently urged that the reasonings adopted by the lower appellate Court amount to perversity for want of proper appreciation of the evidence. However, I prefer to disagree with this proposition while holding that Placido Francisco Pinto failed to prove that Jose Francisco Pinto and his wife sold the property by sale deed dated 14.9.1970 for legal and valid consideration. The consequential finding came to be recorded that the sale deed was null and void for want of proper consideration. The entire evidence on record in that regard is also found to be inadequate to hold that there was proper consideration which passed between the parties. Similarly, there is finding to the effect that Jose Francisco Pinto and his wife had proved that their signatures were obtained fraudulently and by misrepresenting that the document pertained to the loan amount of Rs.12,000/- paid by Placido Francisco Pinto on behalf of Jose Francisco Pinto. The evidence in that regard is also properly assessed on the background of the factum of relationship between the parties.

In this regard, we must follow the dictum laid down by the Apex Court in the case of **Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar and ors.** (1999) 3 SCC 722 whereby it is laid down that it is not within the

domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. It is true that the lower appellate Court should not ordinarily reject witnesses accepted by the trial Court in respect of credibility but even where it has rejected the witnesses accepted by the trial Court, the same is no ground for interference in second appeal when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences are possible, one drawn by the lower appellate court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate court unless it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at without evidence which is not the case involved in this matter. What is reflected from the Judgment of the lower appellate Court Judge is that he has properly appreciated the entire evidence and has come to the conclusion on factual issues to the effect that the impugned sale deed was without consideration and was obtained by fraud and misrepresentation and, as such, the appeals at hand were disposed of which, in my view, was a correct approach.

6. It was urged on behalf of the appellant that since there were two separate suits and the trial Court had dealt with those suits separately, it was incumbent upon the lower appellate Court to adjudicate the appeals separately. In my considered view, there was neither any illegality nor irregularity when the lower appellate Court adjudicated the appeals and disposed of those appeals by common Judgment, especially when the issues involved and parties were the same, also the *lis* between the parties was identical and, therefore, the lower appellate Court has rightly disposed of the appeals by common Judgment.

The learned Counsel for the appellant further submitted that the issues to the effect that the suit for declaration was barred by law of limitation and that the subsequent suit was barred by principles of *res judicata* were not considered and, therefore, on that count alone the appeals deserve to be admitted.

7. I have particularly perused the entire record in the light of this submission. I must note that the question of limitation in this case is a mixed question of law and fact which again was not raised either before the trial Court or before the lower appellate Court and, therefore, it cannot be raised for the first time in the second appeal. No doubt that the question of

limitation which is purely a question of law could be raised at any stage, but in this case it is not applicable as the issue of limitation would be a mixed question of law and fact and, therefore, it cannot be raised for the first time at this stage. Similarly, the question of *res judicata* would not come in the way at all for obvious reasons. Both the suits were adjudicated properly by both the Courts below and, therefore, the principle of *res judicata* cannot be raised at all.

7. In view of this position, I am satisfied that the reasonings adopted by the lower appellate Court are just, legal and proper and, therefore, no interference is called for. In the result, both the appeals stand dismissed with no order as to costs.

P.V. KAKADE, J.

ssm.